THE BOOK OF MARRIAGE

The Risala : A Treatise on Maliki Fiqh

'Abdullah ibn Abi Zayd al-Qayrawani (310/922 - 386/996)

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(Including commentary from *ath-Thamr ad-Dani* by al-Azhari)

Abu Muhammad 'Abdullah, a Maliki faqih known as "Shaykh al-Faqih" and "little Malik". He was the head of the Maliki school in Qayrawan. He wrote *ar-Risala* and *an-Nawadir* and several other books. (His biography in the ***Tartib al-Madarik***)

[These are eight things. The first, marriage, is the root and rest are consequences. Each has a linguistic meaning and usage which we will mention in its proper place. Marriage (nikah) linguistically means intercourse and is used as a metaphor for the contract. In technical usage, it is actual for the contract and metaphorical for intercourse. It is used in custom to mean to mean intercourse as the Almighty says, "Until she marries a husband other than him," (2:230) and so it is known from this that *nakaha* is used for intercourse between any man and woman. Marriage in the sense of intercourse is only permitted in the Shari'a by one of two matters: the contract of marriage or ownership by the words of the Almighty, "those who guard their private parts – except from their wives or those they own as slaves, in which case they are not blameworthy." (23:5-6) Marriage has four pillars: the wali, the place, the form and the obligatory dower.]

32.1 Obligatory elements for the validity of marriage

32.1a. A guardian

Marriage is not valid without a guardian (wali),

[There is no marriage contract except with a guardian. As Ibn 'Arafa says, the guardian is either her owner (in the case of a slave), or her father or male relative, or an agent or guardian, or the authority(the ruler) or someone who is Muslim.

Preconditions for that are being Muslim, free, adult, sane and male. Integrity is not a precondition for the validity of the contract in the famous position, but part of its perfection, nor is common sense. So the fool can make a contract for his daughter with the permissible of his guardian according to Ibn al-Qasim. This is a precondition of validity and the contract is not valid without a guardian by the statement of the Prophet, "A woman does not give herself or another woman in in marriage. The woman who gives herself in marriage is a fornicatress." (as-Daraqutni who said that it is sahih and hasan.) If it occurs without a guardian, then the marriage is null and void both before and after consummation, even if she gives birth to several children. There are two transmission about whetherthe nullification is a divorce or not.]

32.1b. A dowry a dowry,

[The dowry is a precondition for the validity of consummation because of the words of the Almighty "Give women their dowry as an outright gift." (4:4)]

32.1c. Two witnesses and two legally acceptable witnesses.
[Having two witnesses is also a precondition for the validity of consummation, not for the contract. Itis a precondition that the two witnesses of the marriage be reputable, based on what Ibn Hibban transmitted in his *Sahih*: the Prophet said, "There is no marriage except with a wali and two legally acceptable witnesses." Marriage without those preconditions is invalid according to the hadith. If there are no legally acceptable witnesses, then there should be a lot of witnesses, like 30 or 40.
One of the preconditions of the validity of the contract is the form of the contract from the wali and husband or agent. The guardian must use an expression which would entail permanent transfer like "I have given to you in marriage". The husband must use an expression which entails acceptance, like "I have accepted." The order is not a precondition, but is recommended. If the husband speaks first and then the guardian speaks after him, the contract is sound as long as the two responses are immediate; a slight difference does not impair the contract as opposed to a major difference. This would be, for instance, if a man who is ill were to say, "If I die from this illness, I have given my daughter in marriage to so-and-so," and then dies a month later, and the husband accepts the contract after his death. The marriage is not valid.
NOTE: A marriage is contracted by the acceptance and answer, even if it was intended a joke on both sides because marriage is a serious matter.]

32.1d.Witnesses must be present at the contract
If these two are not present to witness the actual making of the contract, it is not permissible for the couple to consummate their marriage until the witnessing has taken place.[i.e. the guardian and husband. In one text, it has the singular, meaning the husband. If it is consummated without witnessing, the marriage is invalidated with a final divorce and they receive the hadd-punishment if they did not make it known and do not have the excuse of ignorance and admit intercourse. If they make it known, there is no hadd, especially they have a feast, drums and one witness.]

32.1e. Minimum amount of dowry
The smallest acceptable amount for a dowry is a quarter of a dinar.
[That by which the contract becomes valid. The dinar is of pure gold and in silver it is three dirhams of pure silver. It can be an equivalent value in goods. There is no maximum because the Almighty says "Give one of them a qintar." (4:20)]

32.2 The authority of the guardian

32.2a. A father arranging the marriage of a virgin daughter

A father can arrange the marriage of his virgin daughter without her permission even if she is
beyond the age of puberty. It is up to him whether he consults her or not.

[To whomever he wants for the dowry he wishes, even for less than a suitable dowry. He can give her choice, and it states in *al-Jawahir* and elsewhere that it is recommended that he ask her permission.]

32.2b. Someone other than the father arranging the marriage of a virginHowever, if anyone other than the father is arranging the marriage of a virgin, such as a guardian appointed in the father's will or anyone else, he cannot give her in marriage unless she is beyond the age of puberty and has given her consent. In this case her silence is taken as consent.

[It says in the *Mudawwana* that an orphan is not given in marriage by her guardian until she comes of age and gives permission. Ibn Naji said, "unless there is a will from the father to marry her to a certain person and then he acts in loco parentis. There is a text in the *Mukhtasar* which states that the guardian as the same position as the father in compulsion to marriage with two preconditions. One is that he the husband is specified and the other is that the father commands that. The shaykh states after this, "The girl is not married unless her father commanded that she be married." What he mentioned about other relatives than the guardian, like the grandfather and brother, is known in the School.]

32.2c. A woman who has been married before

A woman who has already been married cannot be given in marriage, by her father or anyone else unless she herself agrees to it and gives verbal consent.

[When she is adult, sane and free and free has not lost her virginity through injury or fornication, be she sensible or foolish, by her father or anyone else. It is limited to the adult instead of the child who loses her virginity before becoming an adult. His marriage is not dependent on her consent. "Sane" excludes the mad woman. Her father can compel her, even if she has children. The judge can also compel the adult mad women if she has no father.

What is mentioned about asking her permission is by word, as Malik, ash-Shafi'i, and Muslim transmitted, "The widow is more entitled to herself than her guardian, and the virgin is asked for consent for herself, and her consent is her silence." What is meant by the widow is the non-virgin.

The difference between the two is the shyness which is found more fully in the virgin rather than the non-virgin.
It is reported from Ibn al-Qassar that modesty has ten parts: nine in women and one in men.
When a woman marries, a third of it goes. When she gives birth, two-thirds is gone, and if she fornicates, it is all gone.]

32.2d. The necessity of the consent of the guardian
A woman can only be married if she has the consent of her guardian or someone suitably qualified from among her people, such as one of her male relations, or the governor.
[Or her agent since a guardian is a precondition for the validity of the contract - there is no disagreement about that with us - or with the permission of someone qualified, which means those who possess the preconditions of guardianship which are: being male, free, sane, adult, not in ihram, and not a unbeliever for a Muslim woman. The ruler acts in default of such a person.]

32.2e. Lowly women
There is a difference of opinion regarding lowly women (*daniyya*) as to whether they can have a guardian that is not related to them or not.
[This is the woman who has neither beauty, money nor position. When she has beauty, money or position, she is noble. Position is like lineage and descent, or a noble father. A guardian who is not related is a Muslim, i.e. he is neither a guardian nor one qualified from her family nor a client nor a ruler when there is a particular guardian. Ibn al-Qasim said that she is permitted to appoint him even when there is a relative. Ash-hab said that that is not permitted unless there is no relative. So the two shaykhs agree on the validity but differ about when this can be done. Ibn al-Qasim says that it is valid although disliked, when is the reliable position, while Ash-hab said that it is not.]

32.2f. Order of precedence in matrimonial guardians
A woman's son has more right to be her marriage guardian than her father and her father has more right than her brother. After this the nearer the relationship the greater the right.
[The son is a closer relative because he is the most entitled of her relatives after her father. The father is more entitled than the brother (full or half) because the brother is not as close as than the father and the father will debar him from inheritance.]

32.2g. The marriage is valid when the more distant acts as guardian
However, if the more distant relative acts as guardian the marriage is nevertheless still valid.
[Even when a nearer relative exists, like the brother. The marriage is valid because the order between them is only about suitability. Differing from it is only disliked provided the marriage is with an equal.
If the husband is not an equal, then it is obliged for the closer relative to reject the marriage, even if the woman is pleased with it. If he does not reject it, it is presented to the ruler, i.e., it is obligatory to reject it and she is not permitted to consent. It is invalid.]

32.2h. A guardian appointed in a will
A guardian appointed in a will can arrange the marriage of a male child under his guardianship[i.e. he can compel him to marry, like the father, when that has benefit, like marrying him to a rich or noble woman.]

32.2i. The limitations of such a guardian but he cannot arrange the marriage of a female child unless the father has given him specific instructions to do so. [And if he has specified the husband, when he says "Marry her to so-and-so." According to the *Mukhtasar*, it is enough that he commands her to compel her to marry that he can marry her to whomever he wishes.]

32.2j. Agnate relatives
Male relatives on the maternal side are not considered suitable as marriage guardians who should rather come from the paternal side.
[To act in giving in marriage, whether they are heirs like the brothers by the mother or not, like the maternal uncle. The guardians come from the paternal side, the stronger being advanced first. So the full brother comes before the half-brother by the father. Ibn 'Umar said, "It is clear from his words that the guardian is only one of the paternal relatives, and there is a contradiction when he says 'someone suitably qualified from among her people, or the governor.' The reply is that the what is meant here about the relative being only from the paternal relatives does not preclude the one who is not a paternal relative being a protector or ruler, and so it is relative.]

32.3 Competition between suitors

No one should propose marriage to a woman if another proposal has already been accepted, nor should anyone try to outbid his brother, if an agreement has already been reached.
[According to what al-Fakhani said, "The expression means a prohibition." This is to propose when there is an outstanding proposal and to bid when there is an outstanding bid provided an agreement has been reached between the couple of the parties to the bid. In respect of marriage, this means that the couple incline to one another so that only the offer and its acceptance remain. In the sale it is a precondition that the money be weighed, for instance, and the goods free of faults. If he sees a fault, he can return it.]

32.4 Forbidden types of Marriage

32.4a. The shighar marriage

A 'shighar' marriage - which is when there is a direct exchange of daughters without any dowry- is not permitted;
[There are three types of forbidden marriage. Shighar is to exchange one woman for another. The basis for its prohibition is found in the *Muwatta'* and two *Sahih* Collections where the Messenger of Allah forbade the shighar. It is derived from lifting, as when a dog lifts its leg to urinate or when a person lifts their leg for copulation. It is also used from a land is devoid of people. It is used for exchanging women without a dowry. The pure shighar is that a man gives his daughter in marriage to a man provided that he marries his daughter to him with no exchange of dowry. The woman whose marriage is consummated receives an appropriate dowry and the unconsummated has nothing.]

32.4b. Marriage without a dowry neither is marriage without a dowry;[If they stipulate that it be dropped. If that happens, then it well-known that it is nullified before consummation, and she receives nothing. There are two positions about whether its nullification amounts to a divorce. After consummation she receives a suitable dower and the child is connected to him and there is no hadd-punishment because of the dispute.]

32.4c. Temporary marriage nor is temporary marriage - which is marriage for a specified, limited period.[By consensus. This is found in Khalil, the *Mudawwana* and elsewhere, whether it is a short or long term such that the person will not live that long. Ibn Rushd said that it is marriage with a dowry, guardian and witnesses which is unsound by setting a term, and its judgement is that it is always invalid without a divorce. If anyone marries a woman in a temporary marriage but does not

enjoy her, it is permitted for his father and son to marry her. There is no hadd for them, and the child is attached to the father and she observes full 'idda. She receives no dowry if it was voided before consummation.
If it is after that, she receives the dowry appropriate to her whether or not a dower was stipulated for her.]

32.4d. Marriage during the idda
Marriage during the 'idda period is also forbidden
[This means forming a contract while she is in her 'idda, whether that it for the death of a spouse or divorce, irrevocable or revocable, based on the words of the Almighty, "until the book reaches its term." The consensus on that if anyone forms a contract with a woman during'idda, it is nullified without divorce because it is agreed to be unsound. If it is consummated, they are punished as are the witnesses if they are aware of that. She received the named dowry and children are connected but the couple do inherit from one another if one dies before it is nullified because the contract was unsound and she is always forbidden to him. When there is only a contract which it is nullified, she is not forever forbidden and he can marry her after the 'idda is he wishes.]

32.4e. Marriage contracts containing uncertainty as is any marriage involving uncertainty (gharar) in either the terms of the contract or the amount of the dowry or any marriage in which the dowry includes anything whose sale is forbidden.
[Like marriage by choice, or where the dowry consists of an runaway slave or runaway camel, or if the dowry is unlawful, like wine and pigs. If anyone of that occurs, then it is invalid before consummation and she has no dowry. It is established after it with the dowry of a woman like her.]

32.4f.When there is a defect in the marriage
Any marriage which is invalid because of some defect in the dowry should be dissolved before the consummation takes place. However, if the marriage is consummated, it is considered valid and the man should then pay the dowry appropriate to the circumstances of the woman he has married.
[Like a marriage for what cannot be lawfully owned, like wine, or is permitted but not valid to sell, like a runaway slave. It should be dissolved by divorce with no dowry. If she has taken it, she returns it. If it is consummated, and only discovered afterwards, she receives a suitable dowry for someone of her deen and lineage.]

32.4g. Defective marriage contracts after consummation

If it is the contract that is defective but the marriage is not dissolved until after it has been consummated, the specified dowry must be paid and any marriage bars (muharim) that would have applied if the marriage had been valid, still apply.
[This is like a marriage without a guardian which is invalid before and after consummation. If it is voided before consummation, there is no dowry. But if it has been, a specified dowry is paid or a suitable dowry. When an invalid marriage is nullified, the bars to marriage formed by it are still binding. Just as would have been the case in a valid marriage. If the marriage is nullified before consummation, these bars do not occur unless some of the preliminaries to intercourse have taken place, like kissing and embracing.]

32.4h. Fake marriage does not permit remarriage
Nor does such a marriage make it possible for a man to remarry a woman whom he has previously divorced with a triple divorce.
[I.e. through an unsound marriage after it is agreed that it is unsound, even if intercourse occurs several times. As for a marriage whose validity is disputed and she is divorced after confirmed intercourse, then she is lawful based on the evidence of whether there is intercourse or not. It achieves imposing bars against intercourse without making marriage lawful to be careful on either side.]

32.4i. It does not entail being muhsan Nor do the two parties involved attain 'muhsan' status. [Because one of the preconditions of becoming lawful and muhsan is the validity of the contract. The correct position is that the couple do not achieve muhsan status through an invalid marriage as we read in *at-Tahqiq*.]

32.5 Forbidden degrees

32.5a. Unlawful through blood relationship Allah has made it haram to marry seven categories of women through blood relationship and seven through suckling and marriage relationship. He says, may He be exalted, "Haram for you are your mothers and your daughters and your sisters and your father's sisters and your mother's sisters and your brother's daughters and your sister's daughters." These are the ones who are haram through blood relationship.
32.5b. Unlawful through suckling or marriage relationship
Those who are haram through suckling or marriage relationship are, as Allah says: "Your mothers who have suckled you and your sisters through suckling,
[This applies whether the nurse is a virgin or non-virgin, even if not yet of puberty, and even if it is a hermaphrodite, alive or dead, when there is

milk in the breasts. The suckling can be once or several times. Mothers and sisters are the only two mentioned in the Qur'an: one is the root and one the branch to indicate that it encompasses all.]

32.5c. Wives' mothers your wives' mothers,
[Every woman who has a connection by birth to the wife, however high, whether he made a contract with her when he was adult or young. The majority of the people of knowledge say that it is general whether or not the marriage was consummated. A marriage contract with the daughter makes her mother unlawful. Other people like 'Ali and Ibn 'Abbas say that "those you have gone into" is a precondition for this and the step-daughter. According to their school, when a man marries a woman and divorces her before consummation, he can marry her mother.]

32.5d. Step-daughters your step-daughters living in your households, if you have consummated your marriage with their mothers - if you have not consummated it there is no harm in marrying them -
[Stepdaughters are the wife's daughter. No consensus about that is understood except what is related from 'Ali that she is not unlawful when she is in the household. There is disagreement about consummation. Ash-Shafi'i says that it is intercourse while al-Baydawi said that it means to go behind a curtain with them which is a well-known allusion to intercourse. Malik and Abu Hanifa said that it means enjoyment with touching, kissing, even if nothing happens from that.]

32.5e. Son's wives the wives of your sons who are born from your loins, [However lows whether the marriage was consummated or not. This applies to milk sons as well by agreement, based on what the Prophet said: "Suckling makes unlawful what lineage makes unlawful."]

32.5f. Two sisters at the same time or being married to two sisters at the same time except if it has already happened."
[Whether by marriage or ownership of if one is by marriage and the other is a slavegirl. An exception is made regarding what has already happened. If it happened before, and has been removed by Islam,
Allah excuses it. Islam eliminates it but there is no punishment for it.]

32.5g. Father's ex-wives And Allah ta'ala also says, "Do not marry any of the women whom your fathers married." [Whether the marriage has been consummated or not. It is by the contract that she

becomes unlawful to the son. It is the same with the ex-wife of the grandfather.]

32.5h. Milk causes marriage barriers And the Prophet, may Allah bless him and grant him peace, made suckling the same as blood regarding the categories of relationship which are haram for marriage.
[This is in the two *Sahih* collections. What birth makes unlawful, suckling makes unlawful. The ayat which indicates the prohibition of being married at the same time relatives other than two sisters and the Sunna adds further categories. Here he indicates here a prohibition made by the Prophet:]

32.5i Being married to a woman and her aunt
And he also made it haram for a woman to marry a man who is married to any aunt of hers. [It is transmitted in the *Muwatta'* and the two *Sahih* collections. The precise rule is that it applies to every two women between whom there is kinship and suckling which prevents them being married together, and so it is unlawful to be married to them both at the same time. If he is married to both of them, both marriages are always null and void, even if he has consummated the marriage, without divorce or dowry for the one whose marriage has not been consummated. If the first woman knows, then the second marriage is void and the first marriage is confirmed and the marriage of the one who claims she is the second is nullified, but it is by divorce. If the first knows of the second and the husband does not claim knowledge about which marriage was first, both marriages are void.]

32.5j. The contract entails marriage barriers
When a man has married a woman, the existence of the contract even without the marriage having been consummated, makes that bride haram for his father and grandfathers and his sons.
[This bar is not based on intercourse.]

In the same way, the bride's mother and grandmothers become haram for him.
[This explains the "mothers of your wives". By a contract with the daughter, the mother becomes unlawful, whether the marriage is consummated or not.]

32.5k. The case of the ex-wife's daughters
However, her daughters are not haram unless either he has had sexual intercourse with her or has experienced physical pleasure

from contact with her, as a result of having married her or owned her as a slave girl or the same thing having happened as a result of a doubtful marriage or ownership.

[Even by looking at other than her face or hands. In the case of the doubtful marriage, such a contract does not make the daughter unlawful. Consummation, intercourse or enjoyment of her makes her unlawful. Looking at her face or hands, even with pleasure, does not. Enjoyment by sound marriage is evident. A case of doubt, for instance, would be when the marriage is a fifth one, or she is in 'idda without him knowing and he enjoys her, or he had intercourse with a woman thinking that she is his wife and so all the branches of each of those women mentioned are unlawful for him.]

32.5l. The effect of fornication Zina (fornication or adultery) does not make partners haram who would normally be halal.

[Even if this is multiple, it does not create the bar either in the root or the branch. It is lawful for him to marry her mother or daughter (as long as it is not his own daughter, who is unlawful to him. That is the position of Malik in the *Muwatta'*. His evident words in the *Mudawwana* are different which says: if he fornicates with the mother of his wife or her daughter he should divorce her. Most shaykhs say that this divorce is mandatory. So what is in the *Mudawwana* and the *Muwatta'* differ. Most shaykhs prefer the *Muwatta'* and it is relied on because all the companions of Malik agree on it except Ibn al- Qasim. Some prefer what is in the *Mudawwana* since Ibn Habib mentioned that Malik said that he had retracted what was in the *Muwatta'* and said that it was unlawful.]

32.6 Intercourse with non-Muslim women

32.6aWomen who are not People of the Book

Allah has made it haram to have sexual intercourse with a kafir woman, not from the People of the Book, either through marriage or ownership.

[This is for the Muslim. This is based on the words of Allah, "Do not marry idolatrous women until they believe." (2:221) Al-Fakhani said that this includes the Magians and Sabaeans who are the people who deviated from Judaism and Christianity and worshipped the angels. It includes idolaters who actually worship idols and others who worship other things like the sun and the moon.]

32.6b.Women of the People of the Book

It is halal to have sexual intercourse with women of the People of the Book if you own them as slaves or are married to any of their free

women, but it is not halal for either a free man or a slave to have sexual intercourse with slave girls from among the people of the Book through marriage to them.
[This is based on the ayat of Allah, "or what your right hands own." We read in *adh-Dhakira* that because the People of the Book have been honoured by the Book and addressed by the Almighty Lord, their women and food are permitted. Others lack this honour by their deprival. It is reported from 'Abdullah ibn 'Umar ibn al-Khattab that it is not permitted to marry a free Kitabi woman by evidence of the ayat of al-Baqara. He says, "There is no *shirk* greater than her statement that her Lord is 'Isa."]

32.7 Marriage to slaves and stepmother's children

A woman cannot marry her slave, nor her son's slave and a man cannot marry his slave girl nor his son's slave girl. He can, however, marry his father's slave girl and his mother's slave girl.
A man is permitted to marry his stepmother's daughter from a previous marriage. [This is clear when he had the daughter before the marriage and was weaned. When he married her while she was nursing or the father has divorced her and then she married a man and had a girl, can the daughter of the first husband marry this girl or not. There are three positions in that. The most likely of them is the prohibition and dislike out of caution. Then he mentioned the reverse of this question]

And a woman can marry her stepmother's son from a previous marriage. [By other than her father. This is when her father marries her after the child is weaned. If he marries her while she is nursing, he is her step-brother by nursing.]

32.8 Number and condition of wives

Both free men and slaves are permitted to marry four free women whether muslims or from the People of the Book. Slaves can marry four muslim slave girls and free men can also do this but only if they are afraid of committing *Zina* and do not have the means to marry free women.

32.9 A man's duties towards his wives

32.9a. Equal treatment

A man should treat his wives equally.

[A man should be equitable with his wives, whether they are free or Muslim slaves or Kitabis. This obligation is indicated by the Book, Sunna and consensus. As for the Book, it is the words of the Almighty, "But if you are afraid of not treating them equally, then only one," (4:3) i.e. choosing one is a command of Allah Almighty to confine oneself to one if you fear injustice. This indicates that justice is obligatory. As the for the Sunna, the Prophet said, "If someone has two wives and is not fair between them, he will come on the Day of Rising with one side lower than the other. The four *Sunan* relate it and the Community agree that it is obligatory. Whoever is not fair between his wives disobeys Allah and His Messenger. He is not permitted to be Imam nor is his his testimony accepted. The preferred position that he confines fairness to the spending the night. As for clothing and maintenance, that is according to the state of each of them: the noble is suitably provided for and the lowly is suitably provided for. There is no obligation in intercourse, but it is forbidden for him to hold back from one in order to be keen towards the other. The division is a day and night or two days if the wives agree.]

32.9b. Maintenance and Housing

He is responsible for their maintenance and housing to the extent that his means allow.

[The husband, free or slave must maintain and provide for his wife, free or slave, Muslim or Kitabi.

The literal sense is that it is only according to his situation. The well-known position is that her situation is also observed and so his like spends for her like in both his hardship and ease. It is the same with clothing. He permitted to give the price to pay for what he owes. He does not have to eat with her. There is agreement that she can divorce him if he is unable to support her after some delay in the well-known position. An opposite position is that he can be divorced without delay which was mentioned by Bahram. His divorce is not an irrevocable one, even if the judge imposes it, but it is not valid for him to take her back unless he finds some wealth which will enable him to be able to support her.]

32.9c. Rights towards slave girls

A man's slave girls and or a slave by whom a man has had a child (umm walad) are not allotted nights in the same way as his wives are.

32.9d.When he becomes liable for support
A man is not liable for maintenance until his marriage has been consummated, or he has been called on to consummate his marriage, given that it is with someone with whom sexual intercourse is possible.
[Whether she is an orphan or otherwise, free or slave, simply by the contract in the well-known position. Maintenance is obliged by two things. One is consummation which means they are alone together whether there is intercourse or not, and whether or not she is someone with whom it is possible to have intercourse since she may have a physical impediment, and the husband is adult andthey are not supervised. The second thing is when he is invited to consummate it and the husband is adult and they are not ill.]

32.10 Marriage by proxy (*tafwid*)

32.10a Definition
Marriage by proxy is acceptable. This is when the husband and the guardian make a contract without mentioning a dowry [Without dispute. It is related in the singular, i.e. the husband can make it. The words of the author are true in two forms because when they do not mention the dowry, either they are explicit in that by proxy as when he says, "I marry you to my ward by proxy" or like "I have married you to my ward" without mentioning the dowry. In both cases the marriage is valid. If they make an explicit precondition that there is no dowry, then it is not permitted and it is invalid before consummation.]
32.10b. A dowry must be fixed in which case the marriage cannot be consummated until the amount of the dowry has been fixed.
[Appropriate to her status on the day of the contract because it obliges inheritance and other fixed rights of marriage and entitles him to consummation, not by the contract nor by death. If one of them dies, they inherit from one another. There is no dowry except by stipulation. Some of them say it is affirmed by death, but that it is weak.]

32.10c. Acceptance of the dowry
If the stipulated dowry is appropriate to the status of the woman in question she must accept it.

However if it is less than her due the choice is hers. If she does not want to accept it, the couple are separated.
[When the dowry is appropriate to her in the School, she must accept it. If it is less than the suitable dowry, as when he stipulates 50 dinars when a suitable dowry is 100, then she can choose. If she is satisfied and is sane and a non-virgin, she can make it binding as long as it is not less than a quarter of a dinar. If she is not pleased with it, then they are separated with a final divorce because it is before consummation.]

32.10d.When the dowry is suitable
If she is satisfied with it, or if the husband makes the amount to what is appropriate, then the marriage is binding on her.
[By adding more to what was stipulated when it did not reach a suitable dowry, and he allots her a proper amount after allotting less, then it is binding.]

32.11 Effects of Change of Religion

32.11a. If one of them leaves IslamIf either one of a married couple leaves Islam, their marriage is invalidated and they automatically become divorced,
[This is by a statement of disbelief or entering another religion. It becomes immediately invalid and there is a final divorce in the famous position, i.e. it is invalid by divorce. If the apostate becomes Muslim, then the marriage remains and there is no need for a contract nor taking back because the tie still exists. If he is killed while an apostate, the spouse does not inherit. If someone who is not an adult apostasies, they agree that he is only killed after becoming adult and being asked to repent. Because one takes note of his apostasy, his slaughtered animal is not eaten and the prayer is not said over him.]

32.11b. Another opinion although another opinion is that the marriage is invalidated but no actual divorce takes place.
[Another position is that the marriage is invalid without divorce, which is transmitted from Ibn Abi Uways and Ibn al-Majishun. They are compelled to abrogate it by the words of the Almighty," Do not hold to the bond of the unbelievers," (60:10) i.e. there should be not bond or marital connection between them.]

32.11c. When a couple become Muslim
If a non-Muslim couple both become Muslim their marriage remains valid.

[This is whether they are Kitabis or others if they become Muslim before or after consummation, whether the marriage was with a guardian and dowry or not. The marriage is valid as long as there is no impediment, like lineage or milk. If there is such an impediment then the marriage is invalid.]

32.11d.When only one person in a couple become Muslim

If one of the couple becomes a Muslim, the marriage is automatically invalidated, but no actual divorce takes place.

[This invalidation is without divorce in the famous position. They describe this question in its various forms. One of them is that the husband is married to a Magian or the like who is not one of the People of the Book and he becomes Muslim and she does not soon after, i.e. within a month. If the time is not long between the two of them becoming Muslim, like a month, the marriage is confirmed whether it has been consummated or not.]

32.11e. When the wife becomes Muslim

If the woman becomes a muslim, her previous husband has the first claim on her if he becomes a muslim during her 'idda period.

[If she is a Kitabi or otherwise when the marriage has been consummated. This is true even if he divorces her in the 'idda, as the divorce of the unbeliever is not considered. If he becomes Muslim after the end of the 'idda, the marriage is not confirmed for her because his Islam is like the revocable divorce and there is not taking back after the end of the 'idda. If she becomes Muslim before her husband and the marriage has not been consummated, then their situation is clear.]

32.11f.When the man becomes Muslim

If the man becomes a Muslim and the woman is one of the People of the Book, their marriage remains valid.

[If he becomes Muslim before her and she is one of the People of the Book, the marriage is confirmed as long as there is no impediment to its continuance like lineage or suckling or if he married her in 'idda, whether his Islam was before consummation or not.]

32.11g. If the woman is a Magian

If the woman is a fire-worshipper (Magian) and becomes a Muslim straight after her husband, they remain married. If there is a delay in her accepting Islam, separation takes place.
[If he becomes Muslim immediately as long as there is no impediment. If she delays, they are separated. What the shaykh says differs to what is in the *Mukhtasar*, which is that if she becomes Muslims after her husband without it being a long time between their becoming Muslim, the marriage is confirmed. "Near" is defined as a month and the like.]

32.11h. Someone with more than four wives

If an idolater who has more than four wives becomes a Muslim he must select four of them and separate from the rest.
[Four of those he is permitted to marry in Islam before or after consummation, whether he had a multiple contract or several contracts with them, whether they are first or last, whether they become Muslim with him or he becomes Muslim and they are Kitabis. Choice is explicit. After the choice he is separated from the others without divorce. The point of the dispute is that if he becomes Muslim with ten wives he chooses four and separates from the rest.]

31.12 Various impediments

31.12a. Divorce by Li'an

If someone divorces his wife by a curse (li'an) he can never marry her again.
[He adds in the *Muwatta'*, "If he denies himself, he is flogged with the hadd and the child connected to him, but he cannot take her back."]

31.12b. Marriage during 'idda

The same applies to a man who marries a woman during her 'idda period and consummates the marriage during it.
[No matter what kind of 'idda it is. We limit the 'idda to being for a revocable divorce because if he marries a finally divorced woman, and she is unlawful to the husband, it is abrogated and there is a hadd but she is not forever unlawful to him.]

31.12c. Marriage of slavesIt is not permitted for a slave or a slavegirl to marry unless their master gives permission.

31.12d.Women not making a marriage contract

It is not permitted for a woman, or a slave, or a non-Muslim to draw up a woman's marriage contract.
[Being male, free and Muslim are preconditions for the validity of the contract since the women is not permitted to undertake the contract for herself let alone another woman. The unbeliever has no authority over a

Muslim woman although he does over an unbelieving woman and can marry her to a Muslim or unbeliever.]

31.12e. Marriage to make re-marriage possible

It is not permitted for a man to marry a woman in order to make it halal for her to remarry a man who has previously divorced her by a triple divorce,

[This is when the motive for marriage to make re-marriage lawful, or he has that intention along with the intention of keeping her if he likes her. What is considered is the intention at the time of the contract. If that intention occurs at the time of consummation here is no harm. This is based on the words of the Prophet, "Shall I tell you about the borrowed billy-goat'?" They said, "Yes, Messenger of Allah." He said, "That is one who makes a woman lawful." Then he said, "Allah has cursed the one who makes a woman lawful and the one for whom he makes her lawful." (ad-Daraqutni) He likens him to an animal and then he said that Allah cursed the two men for what they did in making her lawful for her ex-husband.] **and if such a marriage did take place it would not make a remarriage of this kind valid.**

[That is because this type of marriage is void before and after consummation some of them make a distinction between a final divorce with consummation and a suitable dowry. If the first marries her with this marriage, it is invalid without divorce and the husband, guardian, witnesses and wife are punished for carrying a marriage designed to make re-marriage lawful.]

31.12f. Ihram precludes marriage

A man in a state of ihram can neither get married himself nor draw up a marriage contract for someone else.

[Whether it is hajj or 'umra. This is because it is valid that the Prophet said, "The person in ihram does not marry or give in marriage nor propose." If there is marriage or giving in marriage, it is always invalid before consummation and so she receives nothing. If it is abrogated after it, she has the dowry because every woman with a consummated marriage receives dowry.]

31.13 Sickness

31.13a. Serious illness precludes marriage, but the dowry is paid from the third

It is not permitted for a man with a very serious illness to get married but if he does get married and consummates the marriage, then his bride's dowry is the first thing to be paid from thethird of his wealth he is permitted to leave as he wills.
[Or for a sick woman which may prove fatal. That is because he is restricted in respect of his property and it is connected to all who has a lien on it absolutely. It is clear that the marriage of a seriously ill person is not allowed, even if he needs a woman to look after him. It is like that in one of the two famous positions. The other position is that it is permissible on account of need. The marriage is void before and after consummation.
The preferred position is that it is nullified by divorce because there is disagreement on it. If it is not consummated, she has nothing. Ibn 'Umar said that the woman whose marriage is consummated receives a suitable dowry. It is the position of Ibn al-Qasim. Ibn Naji said that it is clear that she has the stipulated dowry, even if it is more than the dowry of a woman like her, from the capital, little or great.]
31.13b. Such a wife does not receive a fixed share
She does not receive the fixed share of his estate which would normally go to a wife.
[This comes from the prohibition by the Prophet against bringing in a new heir or removing one, and to act other contrary to its aim.]
31.13c. Divorce when ill
If such a man divorces a wife, that divorce is binding on him, but, if he dies from his illness, his wife still inherits from him.
[It is divorce because he is sane and responsible, whether the divorce is final or revocable. She does not inherit from him if the divorce is treble. She inherits from him if its revocable as long as the 'idda is not over. If he recovers from his illness and falls ill again, she does not inherit from him because the restriction was removed by health.]
[This chapter is continued in the next page which deals with divorce, 'Dhihar'-repudiation, (ila') vow of celibacy within marriage, mutual cursing (li'an), 'Khul'-'divorce, and suckling)